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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 956

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
The Decisions Below	4
Reasons for Granting the Writ	6
Conclusion	10
Appendix A—Per Curiam Opinion, January 18, 1965	11
Appendix B—Order entered June 3, 1964	12

CITATIONS.

Independent Petroleum Workers of America v. American Oil Co., 33 L. Ed. 2d 333 (1964) 5, 6, 7, 8

Int'l Tel. & Tel. Corp. v. Local 400, Int'l Union of Electrical Radio & Machine Workers, 286 F. 2d 329 (3rd Cir. 1960) 9

Int'l Union of Elec. Radio & Machine Workers v. Gen'l Elec. Co., 332 F. 2d 485 (2d Cir. 1964) 8

Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F. 2d 644 (2d Cir. 1962) 9

United Steelworkers of America v. American Mfg. Co., 363 U. S. 564 (1960) 6

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960) 6

United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U. S. 574 (1960) 6, 7, 8

Westinghouse Elec. Corp. v. Local 1790, Int'l Ass'n of Machinists, 304 F. 2d 449 (1st Cir. 1962) 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, United Packinghouse, Food and Allied Workers, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 18, 1965.

OPINIONS BELOW.

The unreported opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is set forth at pages 34-37 of the Brief and Appendix for Plaintiff-Appellant in the Court of Appeals (nine copies of which have been filed with this Court). The per curiam opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition, p. 11, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 18, 1965. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Is it essential to the arbitrability of a grievance complaining of the contracting out of bargaining-unit work that the collective bargaining agreement contain an express prohibition of the practice?

2. Was the employer's refusal to submit the grievance to arbitration a violation of the arbitration provisions of the collective bargaining agreement between the parties?

3. In determining whether a particular grievance falls within a generally-worded "exception clause" in the collective agreement, does a court invade the province of the arbitrator by considering the history of prior bargaining and other extrinsic evidence?

4. Is it necessary for a party seeking arbitration of a grievance to file a separate grievance expressly raising the issue of arbitrability where arbitrability is initially denied by the employer?

STATUTE INVOLVED.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Section 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

Petitioner, United Packinghouse Food and Allied Workers, AFL-CIO, a labor organization representing employees of the defendant, Wilson & Co., Inc., filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, to compel the defendant to arbitrate a grievance arising at its plant in Albert Lea, Minnesota, one of the facilities covered by the collective bargaining agreement (App. 3-14). The complaint, filed on March 26, 1963 (App. 1), invoked the jurisdiction of the District Court under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Section 185(a).

The complaint charged that the Company's refusal to arbitrate the grievance was contrary to Sections 124 through 133 of the collective bargaining agreement, which provide a procedure—with arbitration as the final step—for the orderly settlement of disputes between the parties (App. 4-5). The grievance asserted that the Company was improperly "contracting out work that belongs to the bargaining unit of Local #6 and should be done by the members of Local #6," Petitioner's local in Albert Lea (App. 5-6, 15). It requested discontinuance of the practice and the payment of wages lost by employees as a result (App. 15). As alleged in the complaint, the Company, by employing "independent outside maintenance men to perform maintenance work usually performed by members of the bargaining unit at the Albert Lea plant", violated the collective agreement. Specifically, the complaint charged that such contracting out was "in violation of the seniority provisions of the agreement set forth in Sections 82 through 90 inclusive thereof, and, in addition, was a discrimination against certain maintenance employees and a policy undertaken to avoid other provisions of [the] agreement in violation of Section 9 of the agreement" (App. 5-6).

The Company's answer admitted the jurisdiction of the court, the collective bargaining agreement, the filing of the grievance, Petitioner's compliance with the procedural steps prerequisite to arbitration, and the Company's refusal to proceed to arbitration (App. 15). The Company asserted, however, that "the contracting out of work is a function of management vested exclusively in the company". As a result, the Company argued that the grievance "is not arbitrable under the collective bargaining agreement, as evidenced by its terms, by the Plaintiff's unsuccessful attempts to limit the company's established managerial right to contract out work and by the Plaintiff's acquiescence in the exercise of this right by the Defendant over a period of many years" (App. 15-16).

Petitioner filed a motion for summary judgment, supported by an affidavit (App. 17-25). The Company submitted affidavits in opposition which described the maintenance work contracted out in the Albert Lea plant between January 4, 1955 and February 21, 1963, listed the mechanical department employees (among those covered by the collective bargaining agreement) laid off since January 4, 1955, set out a proposal relating to contracting out allegedly made by Petitioner to the Company in 1962, and asserted that, during contract negotiations in two earlier years (1952 and 1960), the Petitioner had tendered clauses, to which the Company refused to agree, that would have prohibited the contracting out of bargaining-unit work (App. 25-32).

THE DECISIONS BELOW.

The trial court denied Petitioner's motion for summary judgment and dismissed the cause (App. 37). In its opinion, the court observed that the arbitrability of the grievance depended on "whether the grievance falls within the clause 'pertaining to matters involved in this agreement'

[in which event the grievance would be arbitrable], or the clause 'incident to the employment relationship' " (App. 35), in which event the grievance would not be arbitrable. The trial court stated that it would be necessary to hear evidence of intent in order to determine which clause applied. It held, however, that the question of whether the grievance was arbitrable was itself an arbitrable issue, which should have been raised by means of a separate grievance (App. 35-36). Thus, the complaint was dismissed on the ground that the Petitioner had failed "to exhaust contractual remedies," since it had failed to file a second, separate grievance, raising the question of the arbitrability of the principal grievance. The trial court stated that the second, subsidiary grievance "most definitely" would be arbitrable (App. 36).

The Court of Appeals, following oral argument on June 3, 1964, noted that the parties had conceded that the issues presented—the arbitrability of a grievance concerning the contracting out of bargaining unit work where the collective bargaining unit contained no express prohibition of the practice—were "substantially the same as certain issues decided by this Court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.* . . . On May 18, 1964 the United States Supreme Court granted certiorari in the *Independent Petroleum Workers* case" (Appendix B, p. 12, *infra*). Accordingly, on that date, it entered an order withholding further action in the present case until such time as this Court "acted on the *Independent Petroleum Workers* case". On January 18, 1965, the Court of Appeals affirmed per curiam the District Court judgment of dismissal, stating the following as the basis for its decision (Appendix A, p. 11, *infra*):

> The Supreme Court on certiorari to this Court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, on November 23, 1964, affirmed this

Court's judgment by an equally divided court. Because of the similarity of issues, the Supreme Court decision in *Independent Petroleum Workers* is determinative of the issue presented in the instant case. On that basis the District Court's judgment of dismissal is affirmed.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals that the grievance filed by Petitioner was not arbitrable is contrary to this Court's decisions in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), which delineated the boundaries of judicial inquiry in suits to compel arbitration under Section 301(a).

In the present case, the collective bargaining agreement provides for the arbitration of grievances "pertaining to matters involved in [the] agreement" (App. 12). The agreement does not contain a provision expressly prohibiting the Company from contracting out bargaining-unit work.

In the *Warrior* case, this Court had before it the very same issue—the arbitrability of a grievance complaining of the contracting out of bargaining-unit work. As here, the contract in *Warrior* did not expressly prohibit contracting out, nor did it even mention the practice. The grievance and arbitration provisions of the contract in *Warrior* applied in the event of any "differences . . . as to the meaning and application of the provisions of [the] agreement, or should any local trouble of any kind arise . . ." 363 U. S. 574, 576. The contract explicitly *excluded* from arbitration "matters which are strictly a function of management . . ." 363 U. S. 574, 576. In the present case, the contract *does not exclude* from arbitration

matters which are a function of management. Here, Section 126 of the contract provides for the arbitration of grievances "pertaining to matters involved in [the] agreement". Section 131 excludes from arbitration only what are vaguely termed matters "incident to the employment relationship" (App. 12-13).

In the contract in the present case, the arbitration clause is at least as broad as that in *Warrior*, and the exception clause ("matters . . . incident to the employment relationship") is at least as vague. Although neither agreement mentions contracting out, it is plain that a dispute as to contracting out is comprehended by the broad language of both arbitration clauses. As this Court said in *Warrior:* "There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration." 363 U. S. 574, 585.

Similarly, in the present case the opposing contentions of the parties raise a dispute as to a matter "involved in the agreement". That dispute is for the arbitrator.

The fact that this Court, by a four-to-four per curiam decision, has affirmed the judgment in *Independent Petroleum Workers of America* v. *American Oil Co.*, 13 L. Ed. 2d 333 (1964), should not militate against granting the writ in the present case. As the Court is well aware, the *Petroleum Workers* case involved not only the issue raised by this Petition, that is, the arbitrability of a contracting-out dispute absent an express contractual prohibition of the practice, but also the question of whether the doctrine of "collateral estoppel" was applicable to deny arbitration in that case, where, in a prior proceeding, the Court of Appeals had denied arbitration. Since this Court's decision in *Petroleum Workers* was not accompanied by an opinion, Petitioner cannot determine on which of the foregoing grounds the decision was based.

2. Realistically, the importance of the issue presented, taken in conjunction with this Court's opinion in *Warrior* and its recent decision in *Petroleum Workers*, justifies and necessitates a clarification of the Court's position respecting the arbitrability of contracting out grievances. In *Warrior* the Court recognized that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement" (363 U. S. 574, 578), and that "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement" (363 U. S. 574, 581). If, by its decision in the *Petroleum Workers* case, the Court has qualified its views as expressed in *Warrior*, such a change in position had best be explained and delineated. If, on the other hand, the teachings and doctrines of the *Warrior* case are still valid, the *Petroleum Workers* case has made it desirable for the Court to reaffirm its views.

3. In addition to its conflict with the principles announced by this Court in the *Steelworkers* trilogy, the decision of the court below is in conflict with decisions of other circuits. For example, in *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), the Court of Appeals for the First Circuit summarily ordered arbitration of a contracting-out grievance where the collective bargaining agreement provided for the arbitration of questions as to the interpretation, application or claimed violations of the agreement. The court could find no difference between the case before it and *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960). In *Int'l Union of Elec. Radio & Machine Workers* v. *Gen'l Elec. Co.*, 332 F. 2d 485 (2d Cir. 1964), the Court of Appeals for the Second Circuit held that a dispute concerning contracting out was arbitrable under

a collective bargaining agreement which provided for arbitration of grievances involving the interpretation or application of a provision of the agreement. The court based its decision on the principle announced in *Warrior* that every grievance is arbitrable unless it is clearly excluded by the terms of the collective agreement. Significantly, the Court of Appeals for the Second Circuit held further that, in determining the arbitrability of a grievance, a court may not consider evidence of prior bargaining on subjects possibly relevant only to the merits of the dispute.

Other cases in which contracting out disputes have been held to be arbitrable, under contractual provisions similar to those contained in the agreement between the parties in this case, are *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962), and *Int'l Tel. & Tel. Corp.* v. *Local 400, Int'l Union of Electrical Radio & Machine Workers*, 286 F. 2d 329 (3rd Cir. 1960).

On the basis of the foregoing it is apparent that the Courts of Appeal are in conflict with respect to the arbitrability of contracting out disputes in the absence of express contractual prohibitions of the practice. In order to alleviate the confusion which has been and will be engendered by these conflicting decisions, as well as by this Court's equally-divided affirmance of the *Petroleum Workers* case, it is desirable that the issue again be considered.

CONCLUSION.

On the basis of the foregoing this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

(PER CURIAM OPINION, JANUARY 18, 1965.)

Before HASTINGS, *Chief Judge*, MAJOR and SWYGERT, *Circuit Judges*.

PER CURIAM. Plaintiff United Packinghouse, Food and Allied Workers, AFL-CIO brought suit to compel defendant Wilson & Co., Inc., to arbitrate a grievance concerning contracted out work which plaintiff contended belonged to its bargaining unit at defendant's plant at Albert Lea, Minnesota.

Both parties concede that the issue here is substantially the same as that decided by this court in *Independent Petroleum Workers of America, Inc.*, v. *American Oil Co.*, 324 F. 2d 903 (7th Cir. 1963), *cert. granted*, 377 U. S. 930 (May 18, 1964). Following oral argument on June 3, 1964, we ordered that further action "be withheld until the Supreme Court has acted on the *Independant Petroleum Workers'* case."

The Supreme Court on certiorari to this court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, on November 23, 1964, affirmed this court's judgment by an equally divided Court. Because of the similarity of issues, the Supreme Court decision in *Independent Petroleum Workers* is determinative of the issue presented in the instant case. On that basis the district oourt's judgment of dismissal is affirmed.

APPENDIX B.

(ORDER ENTERED JUNE 3, 1964.)

Oral arguments on this appeal were heard by this Court on June 3, 1964, and the case was taken under consideration. The issues herein are substantially the same as certain issues decided by this Court in *Independent Petroleum Workers* v. *American Oil Co.*, 7 Cir., 324 Fed. 2d 903 (1963). On May 18, 1964 the United States Supreme Court granted certiorari in the Independent Petroleum Workers case.

IT IS ORDERED that further action by this Court on the instant case be withheld until the United States Supreme Court has acted on the Independent Petroleum Workers case, and that the instant case be stricken from the current calendar.